FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC RECORDS

FROM: MARY W. DOVE
SECRETARY OF THE COMMISSION

DATE: December 17, 2003

SUBJECT: *Ex Parte* COMMUNICATION REGARDING
REVISED DRAFT AO 2003-31

Transmitted herewith is an e-mail submitted by Messrs. Marc E. Elias and Brian Svoboda on behalf of Senator Mark Dayton.

Proposed Advisory Opinion 2003-31 is on the agenda for Thursday, December 18, 2003.

Attachment:

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December 17, 2003

VIA FACSIMILE

Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion Request 2003-31

Dear Ms. Dove:

On behalf of Senator Mark Dayton, we write to comment further on Advisory Opinion Request 2003-31.

We believe that the Commission can issue an opinion that gives Senator Dayton and other candidates clarity and flexibility in meeting their Millionaires' Amendment obligations, while staying safely within the bounds of the statutory and regulatory language. The debate at the Commission's December 11 meeting and the most recent General Counsel's Draft prompt us to make the following observations:

First, 11 C.F.R. § 400.10's use of the term "aggregate" does not compel the Commission to count reimbursed expenses permanently toward the Millionaires' Amendment thresholds. Variants of the word "aggregate" occur several times in Commission regulations. Yet in many of these instances, reimbursed spending does not count permanently toward the relevant limit:

- Individuals may not make contributions to candidates "that, *in the aggregate,* exceed $2,000." 11 C.F.R. § 110.1(b) (emphasis added). Yet while loans are ordinarily treated as contributions, they are excluded from § 110.1(b)'s limit when repaid. *See* Amendments to Federal Election Campaign Act of 1971; Regulations Transmitted to Congress, 45 Fed. Reg. 15,080, 15,081 (1980).

- Publicly funded presidential primary candidates may not spend funds which, "*in the aggregate,* exceed $ 10,000,000" adjusted for inflation. 11

C.F.R. § 9035.1(a)(1) (emphasis added). Yet reimbursed expenses incurred to transport the media are not counted toward that limit. *See* FINANCIAL CONTROL AND COMPLIANCE MANUAL FOR PRESIDENTIAL PRIMARY CANDIDATES RECEIVING PUBLIC FINANCING, at 178-83 (2000).

- Publicly funded presidential primary candidates also may not personally spend more than "$50,000 *in the aggregate.*" 11 C.F.R. § 9003.2(c) (emphasis added). Yet spending on a candidate's credit card does not count against this limit, so long as it is repaid within 60 days of the closing date of the statement. *See* 11 C.F.R. § 9035.2(a)(2).

Moreover, the Commission is not simply interpreting a reporting provision when it considers this request. Like the three limits discussed above, the regulations at 11 C.F.R. Part 400 can have a direct and irreversible effect on the competitive balance between candidates.

When candidates are forced to count reimbursed spending toward the Millionaires' Amendment thresholds, they do not simply disclose different numbers on their FEC reports. Rather, they come closer to having their opponents raise funds in increments of $6,000 or $12,000 per election. The Commission should avoid this outcome except when necessary "to allow a candidate to respond to very large expenditures of personal funds by an opposing candidate." Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, 68 Fed. Reg. 3,970, 3,977 (2002).

Second, the rule for personal credit card spending by publicly funded presidential primary candidates provides a good analogy to this situation and a logical basis for Commission advice.

The presidential primary rule allows candidates to make reimbursed purchases on behalf of their campaigns, regardless of the character of the spending. *See* 11 C.F.R. § 9035.2(a)(2). It thus allows more spending than the normal exemption for reimbursed travel, lodging and subsistence. *See* 11 C.F.R. § 116.5. However, the rule also provides some protections. By requiring the use of a credit card, and by requiring reimbursement within 60 days of the closing date of the credit card statement, it makes it hard for candidates to funnel large amounts of personal funds into the race, and thus preserves the integrity of the limit.

The General Counsel's draft acknowledges that the Commission has some flexibility in deciding what counts against the Millionaires' Amendment thresholds. For example, one could argue – as the General Counsel initially did – that a literal reading of § 400.10 requires candidates to count even their timely reimbursed travel, lodging and subsistence expenses toward the thresholds, because they are not technically exempt from the definition of "expenditure." The General Counsel's draft wisely departs from that course, recognizing that such a reading would create an odd result for no reason. *See* General Counsel's Draft at 5.

To adopt the presidential rule in the Millionaires' Amendment context would logically extend this same approach. It would simply clarify that a candidate may pay for any expense on his or her personal credit card, and not have the expense count toward the Amendment's thresholds if reimbursed within 60 days of the closing date of the credit card statement.

It was asked at the December 11 meeting why principal campaign committees should not simply obtain credit cards of their own for candidate use. While the Commission's manual for publicly funded presidential primary candidates suggests the "alternative" of issuing the candidate a committee credit card, neither it nor the Commission's rules precludes the other option. FINANCIAL CONTROL AND COMPLIANCE MANUAL at 27. Moreover, to presume the availability of such cards in a response to this request might create problems for smaller campaigns that would face the same questions posed here, and yet might have more difficulty in obtaining separate credit cards of their own.[1]

Third, the Commission could adopt an interpretation under which a candidate's expenditures may not be "backed out" of the Millionaires' Amendment calculations once he or she exceeds a threshold under 11 C.F.R. § 400.40. This would keep candidates from gaming the system and depriving their opponents of access to enhanced limits after the fact.

Finally, the Commission should consider the administrative difficulties that adoption of the General Counsel's draft could create for candidates across the board.

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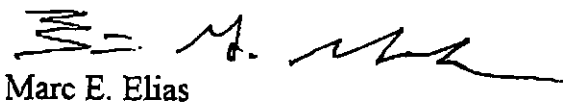
[1] Senator Dayton's principal campaign committee does not currently have a credit card of its own.

As we have observed before, counting all reimbursed spending toward the Millionaires' Amendment threshold poses create significant burdens for smaller committees that otherwise would have no real chance of triggering relief for opponents.

Accordingly, we again urge the Commission to revise the draft advisory opinion to address the concerns stated herein.

Very truly yours,



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cc: Lawrence M. Norton, Esq.
Esa Sferra, Esq.
Members of the Commission